86-126

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. 86-

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JOHN R. BORSCH,

Petitioner,

v.

MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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10pp

## QUESTION PRESENTED

Whether Petitioner, in performing off-duty police work, was acting in the capacity of an independent contractor or as an employee for such work for Social Security eligibility purposes.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals, Eleventh Circuit, entered against him with respect to his claims for Social Security Disability Benefits. References to the Appendix of this Petition shall be made with the symbol "A".

## OPINION BELOW

The Judgment sought to be reviewed is not reported, however, a copy of the Per Curiam Affirmance is attached (A-1).

## JURISDICTION

The Judgment sought to be reviewed is final and was entered May 1, 1986. No petition for rehearing was filed. Jurisdiction for this Court to review by Certiorari is conferred by 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether Petitioner, in performing off-duty police work, was acting in the capacity of an independent contractor or as an employee for such work for Social Security eligibility purposes.

## STATUTES AND RULES INVOLVED

20 C.F.R. §404.1007 of the Social Security Administration Regulations Number 4 provides:

(a) GENERAL. The common-law rules on employer-employee status are the basic test for determining whether you and the person or firm you work for have the relationship of employee and employer. Even though you are considered self-employed under the common-law rules, you may still be an employee for Social Security purposes under §404.1006 (relating to corporation officers) or § 404.1008 (relating to workers in four specific jobs). In general, you are a common-law employee if the person you work for may tell you what to do and how, when, and where to do it. the person or firm you work for does not have to give these orders, but needs

only the right to do so. Whether or not you are a common-law employee is not always clear. Several aspects of your job arrangement are considered in determining whether you are an employee or are self-employed under the common-law rules.

(b) FACTORS THAT SHOW EMPLOYEE STATUS. Some aspects of a job arrangement that may show you are an employee are as follows:

(1) The person you work for may fire you.

(2) The person you work for furnishes you with tools or equipment and a place to work.

(3) You receive training from the person you work for or are required to follow that person's instructions.

(4) You must do the work yourself.

(5) You do not hire, supervise,

or pay assistants (unless you are employed as a foreman, manager or supervisor).

(6) The person you work for sets your hours of work, requires you to work full-time, or restricts you from doing work for others.

(7) The person you work for pays you business or traveling expenses.

(8) You are paid by the hour, week or month.

(c) FACTORS THAT SHOW SELF-EMPLOYED STATUS. Some aspects of a job arrangement or business venture that may show you are self-employed are as follows:

(1) You make a profit or suffer a loss.

(2) You are hired to complete a certain job and if you quit before the job is completed you may be liable for damages.

(3) You work for a number of persons

or firms at the same time.

(4) You advertise to the general public that you are available to perform services.

(5) You pay your own expenses and have your own equipment and work place.

(d) QUESTIONS ABOUT YOUR STATUS. If there is a question about whether you are working as an employee or are self-employed, we or the Internal Revenue Service will make a determination after examining all of the facts of your case.

## STATEMENT OF THE CASE

Petitioner was a Claimant for Social Security Disability Benefits in the proceedings below. Respondent Secretary is responsible for the administration of the Social Security Act under which the Petitioner sought benefits.

### Course of Proceedings Below

Petitioner brought action pursuant to 42 U.S.C. 405(g) to obtain judicial review of the final decision of the Secretary finding that Petitioner was not entitled to eligibility for Social Security Disability Benefit because he failed to meet the quarters of coverage necessary in order to be entitled to same. The United States Magistrate made his Report and Recommendation on August 7, 1985, finding that the Secretary's decision was supported by substantial evidence and recommending

that the decision of the Secretary be affirmed. Petitioner filed his Objection to the Report and Recommendation of the Magistrate on August 20, 1985. The District Court entered its Order on September 13, 1985, accepting the Report and Recommendation of the Magistrate in ordering that the decision of the Secretary was affirmed. The Petitioner sought review of the District Court's Order in the United States Court of Appeals, Eleventh Circuit, which Court affirmed Per Curiam the decision of the United States District Court for the Middle District of Floirida without opinion on May 1, 1986 (A-1). From such opinion, Petitioners now seek review.

## STATEMENT OF THE FACTS

Petitioner, BORSCH, at all times material, was a policeman employed full

time by the Clearwater, Florida Police Department (A- 20 ). While employed as a policeman, Petitioner worked off-duty for private businesses. His off-duty activities would be in the nature of security guard and/or traffic control. It was the decision of the Secretary that while doing these jobs, he was an "independent contractor". It is the position of Petitioner that he was an "employee" of these businesses. The difference is of utmost importance because if Petitioner is found to have been an "employee" while working off-duty, then BORSCH would have had the necessary quarters of coverage to be eligible for Social Security Disability Benefits (A- 15 ). In fact, the Administrative Law Judge acknowledge in his Decision of December 5, 1983, that if the Petitioner was found to have received "wages",

that he would be entitled to the four additional quarters of coverage necessary in order to show his eligibility under the Social Security Act (A-15 & 37) Therefore, it is of utmost importance to properly and fairly adjudicate the Petitioner's status under the definition of "common-law employee".

Petitioner contends that the Secretary is not supported by substantial evidence and the denial of his claim for eligibility for Social Security Benefits, and that the lower Courts erred in affirming the Secretary's decision. Further, the Secretary failed to properly apply the law and the regulations of the Social Security Administration in determining whether or not Petitioner was an independent contractor or an employee at the time of his performance of off-duty work for the various employers.

## REASONS FOR GRANTING THE WRIT

20 C.F.R. 404.1007, previously set forth in this Petition and entitled "Common-Law Employee" is a regulation propounded by the Social Security Administration to try to set forth certain criteria to assist in a determination of whether a person is acting as an employee or an independent contractor at the time of his performance of the job in question. As previously stated, this question is of primary importance because if Petitioner was found to have been an "employee" at all times material, then he would have the requisite quarters of coverage in order to obtain an entitlement to Social Security Disability Benefits (A-15&37)It is of further importance to persons other than Petitioner and is of nationwide application due to the numerous municipalities

and other governmental law enforcement agencies which do not fall within the purview of the Social Security Act but whose officers and policeman entertain off-duty jobs in order to supplement their income on a regular basis. Therefore, the issue presented to this Honorable Court bears far more significance than simply to the case at hand involving the Petitioner, JOHN R. BORSCH.

In prior written statements and arguments before the lower Courts and the administrative agencies, Petitioner has attempted to set forth in detail a comparison between the details of the off-duty work performed by JOHN R. BORSCH compared to the factors contained in 20 C.F.R. §404.1007(b) entitled "Factors That Show Employee Status".

## SECTION 404.1007(b) FACTORS

1. The person you work for may fire you.

2. The person you work for furnishes you with tools or equipment and a place to work.

3. You received training from the person you work for or are required to follow that person's instructions.

4. You must do the work yourself.

5. You do not hire, supervise, or pay assistants (unless you are employed as a foreman, manager, or supervisor).

6. The person you work for sets your hours of work, requires you to work full-time, or restricts you from doing work for others.

7. The person you work for pays for your business and traveling expenses.

8. You are paid by the hour, week or month.

PETITIONER'S DETAILS

1. The particular firm engaging the security services of BORSCH could discharge him at any time for any reason.

2. No tools or equipment were provided by the employer. BORSCH wore his police uniform and carried with him his police equipment. Employer always supplied BORSCH with his work place.

3. BORSCH did not receive any training because he utilized his expertise as a police officer, however, BORSCH was told when to go to work, what to do and how long he was to work. Further, the individual employer would direct the type of security BORSCH was to perform, including traffic control when necessary.

4. BORSCH had to perform all work himself.

5. BORSCH did not have the power to hire, supervise or pay any assistants while performing his work.

6. BORSCH was required to work certain hours. That is, he was told when to report to work, when to take a break, how long to work and when he could go home.

7. There really were no business or traveling expenses necessary for the job to be done.

8. All pay was done on an hourly basis for work performed.

In addition to the 20 C.F.R. Section 404.1007(b) factors that show employee status, 20 C.F.R. Section 404.1007(c) refers to factors showing self-employment status. In applying those to the situation of Petitioner, the following result: (1) BORSCH was not allowed to make a

profit or suffer a loss (he simply was paid by the hour for the hours worked); (2) He was hired to work certain hours, rather than completing a certain job; (3) The only other party involved that he worked for at the same time was the City of Clearwater Police Department, but any security work was done on an off-duty, off-hour basis; and (4) He did not advertise to the general public that he was available to perform services. It is true that he wore his uniform on duty, but did not provide his own workplace, completing his work on the employer's premises. By a showing that Petitioner had no indicia of self-employed status under 404.1007(c) this only goes further to substantiate that he was an "employee".

In Turner v. Heckler, 754 F.2d 326(10th Cir. 1985), the United States

Court of Appeals rejected the Appeals Councils' finding that the rejection of the claimaint's Application for Benefits was supported by substantial evidence. The Court held that where the Council based their decision to deny benefits on a factor or set of factors that are improper that the decision eminating from that determination cannot be supported by substantial evidence. Turner at 330-331.

It is clear from the decision of the Administrative Law Judge that he relied heavily on the "ability of the employer to control" to base his decision rather than on all of the factors under 20 C.F.R. 404.1007. Therefore, the Secretary is not supported by substantial evidence.

Petitioner would specifically point out at this stage that the Administrative

Law Judge stated "Should the Claimaint be found to have received 'wages' as opposed to 'self-employment income' the Claimaint will be entitled to four addition quarters of coverage (A- 15 ). The Social Security Administration had already made a determination that Petitioner was entitled to 16 quarters of coverage. Therefore, Petitioner would, with these additional four quarters of coverage, have the requisite 20 quarters of coverage for the preceeding 40 quarters prior to the onset of disability in order to be entitled to Social Security Disability Benefits.

Petitioner has relied upon and would refer this Honorable Court to its decision in United States v. Silk, 331 U.S. 704 (1947). This decision dealt with the determination of an employee/ independent contractor (self-

employed) status for Social Security purposes. This Court stated that the terms "employment" and "employee" are to be construed to accomplish the purpose of the enactment of the Social Security Act. The Court did not, at that time, deal with 20 C.F.R. §404.1007, however, this Court referred to the fact that the decisions dealing with whether a person was an employee or an independent contractor have been troublesome to the Courts for quite some time. In Silk, certain persons unloaded coal for a retail coal dealer under an arrangement by which they were paid an agreed price per ton. They furnished their own picks and shovels, and worked when and as they pleased, and worked for others at will. This Court held that those persons were employees within the meaning of the Social

Security Act, and not independent contractors, despite the fact that two lower Courts had held these individuals to be independent contractors. At Pages 716-717 of the Silk opinion, it is stated as follows:

> Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders of the Silk case were independent contractors. They provided only picks and shovels They had no opportunities to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid.

The facts of the case at bar are very similar to those in the Silk opinion. As an off-duty police officer, Petitioner provided his own uniform and equipment, much as the unloaders provided their own picks and shovels. Petitioner had

not opportunity to gain or lose except from the work performed by him, that is, he had no opportunity to profit from the business of the employer that he was performing security work for, much as the onloaders had no opportunity to gain or lose except from the work performed by their hands and their simple tools. This Court determined in Silk that it was insignifacant that the unloaders did not work regularly.

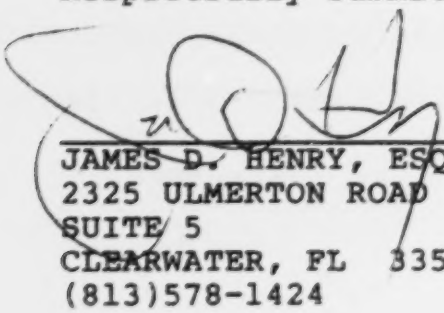
Petitioner did not work at the security job on a regular basis either. Further, the Silk employees worked in the course of the employer's trade or business. Petitioner also performed his services in the course of his then employer's trade or business in assisting in the security and/or traffic control of the individual company or business that hired him. The similarities are striking

and activities of Petitioner herein clearly fall within the guidelines that are established in United States v. Silk.

As previously stated, this case has far more of a reaching affect than just to Petitioner. It is of national importance and significance because of the numerous policemen and other law enforcement officials that perform off-duty work in security and/or crowd or traffic control. Most of these individuals are not otherwise covered under the Social Security Act because of the exemptions available to local and other governmental units which are not required to be included under the Social Security Act. Petitioner respectfully requests that this Court take jurisdiction of this cause and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit for a review

of the decisions of the courts and administrative agencies below.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing have been furnished by United States Mail to the Solicitor General, Department of Justice, Washington, D.C., 20530, on this 25 day of July, 1986.

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ATTORNEY FOR PETITIONER,
JOHN R. BORSCH

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 85-3884
Non-Argument Calendar

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D.C. Docket NO. 84-909

JOHN R. BORSCH

Plaintiff-Appellant,

versus

OTIS R. BOWEN,
Secretary of Health
and Human Services,

Defendant-Appellee.

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Appeal from the United States
District Court
for the Middle District of Florida

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(May 1, 1986

Before JOHNSON and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25 "Costs taxed against plaintiff-appellant"

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Judgment Entered: May 1, 1986
For the Court: Spencer D. Mercer, Clerk

By: _____
Deputy Clerk

EXCERPTS FROM
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION
UPON REMAND BY THE APPEALS COUNCIL

| IN THE CASE OF: | CLAIM FOR: |
| --- | --- |
| John R. Borsch<br>(Claimant) | Period of Disability<br>and Disability<br>Insurance Benefits |
| | 181-22-6897<br>(Social Security Number) |

This case is before the administrative law judge on a request for hearing. The administrative law judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The genreal issues are whether the claimaint is entitled to a period of disability and disability insurance benefits under Sections 216(i) and 223,

respectively, of the Social Security Act, as amended. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimaint was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement. . . .



. . Section 216(i) of the Social Security Act provides for the establishment of a period of disability and Section 223 of the Act provides for the payment of disability insurance benefits where

the requirements specified therein are met. Both Sections provide that an individual will be entitled to a period of disability and disability insurance benefits only if he an "insured" individual. An individual shall be insured for disabililty insurance benefits in any month if he would have been a fully insured individual had he obtained age sixty-two and filed an application for benefits under Section 202(a) on the first day of such month and he had not less than twenty quarters of coverage during the forty quarter period which ends with the quarter in which such month occurred. (The definition of a "fully insured individual" need not be included in this decision since the claimant has satisfied this definition and it is not in dispute.)

In accordance with Section 213(a) of

the Act, the term "quarter of coverage" means, for calendar years before 1978, a quarter in which an individual has been paid $50.00 or more in wages or for which he has been credited with $100.00 or more of self-employment income. The amounts of wages and self-employment income with which an individual must have to be credited for a quarter of coverage in later years are $250.00 for 1978, $260.00 for 1979, $290.00 for 1980, and $310.00 for 1981. In accordance with Section 211(b) of the Act, the term "self-employment income" shall not include earnings from self-employment of less than $400.00.

Section 205(c)(3) of the Act provides that the Secretary's record shall be evidence for the purpose of proceedings before the Secretary or any court of the amounts of wages paid to and

self-employment income derived by an individual and of the periods such wages were paid and such income was derived. The absence of any entry on such record as to wages or to self-employment income in any period shall be evidence that no such alleged wages were paid to or that no such alleged income was derived by such individual during that period. Section 205(c) of the Act provides, as pertinent, that prior to the expiration of the time limitation, three years, three months, and fifteen days, following any year, the Secretary may, if it is brought to his attention that any time of wages or self-employment for such year has been omitted from such records, correct and include such omitted items to his records. After the expiration of the time limitation following any year, the absence of any entry in the

Secretary's records as to the wages alleged to have been paid by any employer to an individual during any period in such year shall be presumptive evidence for the purposes of this title that no such alleged wages were paid to such individual in such period, and the absence of an entry in the Secretary's records as to the self-employment income alleged to have been derived by an individual in such year shall be conclusive for purposes of this title that no such alleged self-employment income was derived by such individual in such year unless it is shown that he filed a tax return of his self-employment income for such year before the expiration of the time limitation following such year.

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Section 205(c)(5) of the Act provides

circumstances under which the Secretary can include in the records of a particular year any omitted itmes of wages or self-employment income. One such exception provides that, regarding wages paid during any period in a particular year to an individual by an employer, where there has been an absence of an entry in the Secretary's record of wages having been paid by such an employer to such individual in such period, the Secretary may include an omitted item of wages. Generally, an individual must supply substantial and probative evidence to prove alleged wages when there is an absence of an entry on an individual's earnings record, which evidence must clearly establish both the amount of wages paid and time of such payment. Said evidence must be sufficient to overcome the statutory presumption of

Section 205 of the Act that no such wages were paid. The Administration first looks for primary evidence of wages such as the individual's earnings record, a statement of an employer secured by the Administration in form SSA7011 or SSA1001, or statements signed by an employer or custodian of an employer's records. A tax form W2 essentially is considered as primary evidence of lag wages. When primary evidence is not available and sufficient explanation is provided why said evidence is not available, secondary evidence of wages can be used. The use of secondary evidence, however, requries either some corroborating evidence or explanation of why corroborating evidence is not available.

Section 404.1005 of Social Security Administration Regulation No. 4 provides,

as pertinent, that an employee is defined as a common law employee as described in Section 404.1007. "Wages" are paid by an employers to employees because of employment therewith.

Section 404.1007 of Regulation No. 4 provides, as pertinent, that common law rules on employer-employee status are the basic tests for determining whether the individual has a relationship of an employee to an employer. In general, an individual is a common law employee if the person employing him may tell him what to do and how, when, and where to do it. It is the right to control activity rather than actually controlling the activity that is important. Some aspects of the job arrangement that my show you are an employee include: (1) the person you work for may fire you; (2) the person you work

for furnishes you with tools or equipment and the place to work; (3) you receive training from the person you work for or are required to follow that persons's instruction; (4) you must do the work yourself; (5) you do not hire, supervise, or pay assistants; (6) the person you work for sets your hours of work, requires you to work full-time or restricts you from doing work for others; (7)the person you work for pays your business or traveling expenses; (8) you are paid by the hour, week, or month. Factors showing self-employed status include: you make a profit or suffer a loss; you are hired to complete a certain job and if you quit before the job is completed you may be liable for damages; you work for a number of persons or firms at the same time; you advertise to the general public that you are

available to perform services; or you pay your own expenses and have your own equipment and work place. All of the facts in the case are examined in evaluating the situations.



THE EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the list of exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

The claimant in this case is a fifty-one year old individual who applied for a period of disability and disability insurance benefits by application of July 24, 1981. The claimant alleged a disability onset date of June 27, 1981. However, the claimaint's earnings record in evidence as Exhibit 4 reveals

quarters of coverage sufficient to establish that the claimant met the special earnings requirements of the Act for eligibility for disability insurance benefits only through the close of September, 1978. In the prior hearing before this administrative law judge, the claimaint alleged that his earnings record was not completed since it failed to include several quarters of coverage for which claimaint alleges entitlement between 1974 and 1981. The administrative law judge limited his consideration to the issue of whether the claimant met the special earnings requirements of the Act as of his alleged disability onset date and did not consider any of the medical factors of eligibility. The administrative law judge did find that the claimaint was entitled to four quarters of coverage for the year 1980,

based upon wages received from Montgomery Ward during that year amounting to $1855.33. The administrative law judge also found that the claimant should be credited with the receipt of $44.25 in wages in 1981 from the same company. However, the administrative law judge found no further entitlement to quarters of coverage between 1974 and 1981, because he determined that claimant did not overcome the presumption created by the Social Security Act that the claimant did not receive any wages for the years in question secondary to absence of entries in the Secretary's records. The administrative law judge further found no entitlement to quarters of coverage based upon self-employment income because he concluded that claimant failed to establish earnings from self-employment income amounting to

$400.00 to any year. . . .

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. . . Perusal of the amounts received by the claimant between 1974 and 1981, reveals that should the claimant be found to have received "wages" as opposed to "self-employment income" at all times, the claimant will be entitled to four additional quarters of coverage. That is, claimaint will have established payment of at least $50.00 in three different quarters prior to 1978, and payment of at least $290.00 in 1980, and $310.00 in 1981. However, claimant already has four quarters of coverage for 1980. The claimaint's earnings record may be corrected to include such wages and quarters of coverage even dating back to 1974, 1975, adn 1977, since according to Section 205(c)(5) of the Act there is an absence of entries

in the Secretary's record of wages having been paid by employers to the claimant at such times.

If, however, monies paid to the claimant are found to represent self-employment income, then claimant would not be entitled to additional quarters of coverage since only in 1980 would he have had self-employment income of $400.00 or more. Section 205(c) of the Act of course allows for inclusion of omitted items of wages or self-employment to an earnings record prior to the expiration of the time limitation, or three years, three months, and fifteen days, following any year. The test is receipt of income rather than prior reporting of same since it is quite evident in this case that taxes have not been paid on the amounts in question either by the claimant or by his employers.

The administrative law judge has concluded that there is substantial and probative evidence to establish payment of the amounts noted above in the form of claimant's statements, copies of cancelled checks, and statements of employers or custodians of employer's records. Additionally, with respect to money received from Maas Brothers, there are sworn statements from fellow officers who reported that they observed the claimant working at the times



alleged despite the fact that Maas Brothers itself was unable to provide any information regarding same. Therefore, the administrative law judge specifically finds that claimant received payment for services of $100.00 during the fourth quarter of 1974, $52.00 during the first quarter of 1975, $36.00

during the fourth quarter of 1976, $53.00 during the fourth quarter of 1977, the total of $182.00 during the year 1978, a total of $56.00 for the year 1979, a total of $472.00 for 1980, and a total of $334.00 during 1981. With respect to 1980 and 1981, the claimant of course has been awarded four quarters of coverage for 1980 already, based upon wages of $1855.33. Therefore, the new earnings can not afford him any additional quarters of coverage regardless of whether they represent self-employment income or wages. With respect to 1981, the claimant already has been credited with $44.25 in wages. With respect to the question of whether or not claimant received wages as opposed to self-employment income based on the amounts noted above, the administrative law judge finds that the claimant

undertook three types of jobs from which he received said monies. These jobs consisted of security guard/traffic controller; a yard man; and air-conditioning installation assistant. The controlling question with respect to whether claimant received wages or self-employment income is whether or not claimant was an employee. In accordance with Section 404.1005 of Regulation No. 4, as pertinent to this case, the claimaint will be considered an employee if he was a common law employee as described in Section 404.1007 of Regulation No. 4. The most important factor to be considered, in the opinion of the administrative law judge, is the control or right to control by the person for whom services were performed by the claimant. Other important factors are the opportunity for profit or loss of

the claimant, and any investment in facilities by the claimant, the permanency of the relationship and the skill required in carrying out his duties. Also, the right to discharge or quit at any time, the furnishing of tools and a place to work, the furnishing of training, the payment of expenses, and the integration of the person's services in the business are factors to be considered.

With respect to his work as a security guard/traffic director, the claimant essentially alleges that he volunteered for such duty through the Clearwater Police Department who kept a list of volunteers and rotated the names. The Clearwater Police Department apparently set the hourly wage rate. The claimant was guaranteed a minimum payment. The claimant did not receive any training

by the people for whom he worked. He alleges that he was told when to report and where to work, with general instructions regarding whether he would be permorming security functions or traffic functions. The administrative law judge particularly notes that in response to questions regarding whether the company could change the methods used by the claimant in doing the work or otherwise direct him as to how to do the work, the claimant has responded that "they could not change the method because it was for security, but they could say where I was to patrol and what areas I was to be stationed." See e.g. Exhibits 36,44, and 46. Individuals utilizing claimant's services generally appear to have been of the opinion that they did not instruct the claimant about

how the work was to be done and did not



believe they could change his methods or otherwise direct him as to how to do the work. See, e.g. Exhibits 35 and 40. The administrative law judge is of the opinion that the preponderance of evidence shows that the claimant was told when and where to work, but was not instructed regarding the details of his work. In fact, it appears that both claimant and the people who hired him believed that the claimant was not subject to instructions regarding the details of his work. In the opinion of the administrative law judge this factor weighs heavily against the claimaint's being an employee in these situations.

Of course, there was no opportunity

for profit or loss on behalf of the claimant nor was there any investment in facilities, factors tending to show a self-employment situatioin. However, these factors are not relevant to the situations in this case.

There was no continuing relationship between claimant and the people who hired him as a security guard or traffic controller. He was not on-call of the employer nor was there any contemplation of recurring work even on a seasonal basis. This factor tends to show that claimant was not an employee.

Similarly, the administrative law judge finds that the claimant had to be a certified police officer and as such was expected to possess the skills of a police officer with respect to secuirty and traffic work. Therefore, the claimaint was hired as a skilled individual.

This factor relates to claimant's essentially working without specific instructions regarding the details of his job and claimant not being provided any type of training from the individual company purchasing his services. In this light, the claimant also was expected to provide his own uniform and tools. Again, the administrative law judge finds that this factor tends to show the claimaint was not an employee.

With respect to the degree of control exhibited over the claimant, the claimant was told at least generally where to work and specifically when to work apparently by means of oral instructions. There is no evidence that claimant was required to adhere to any written procedures. Of course, the work being done could not be performed other than on or about the employer's premises, nor

at times other than during the operation of business.

The claimant was paid an hourly rate rather than on a commission basis or by the job, which customarily indicates an employer-employee situation and similarly was guaranteed a minimal amount. Additionally, the claimant could quit at any time and he could be fired at any time. This does relate to the issue of control and tends to establish an employer-employee situation.

It does appear that the claimant himself was expected to perform work, but that claimant was not chosen by the person requiring his services, but rather by the Clearwater Police Force on a rotating basis with other police officers. There was no restriction upon claimant's ability to work for other individuals except, of course, during the specific hours

he was to perform the duties requested of him. In fact, the adminstrative law judge specifically notes that even when performing security and traffic duties, the claimant



primarily considered himself to be a police officer and as such, on-duty as a police officer. See, e.g., Exhibit 39. Finally, the administrative law judge notes that while claimant himself did not make his services available to the general public by means of advertising or such, he did in effect make his services available by means of putting his name on a list of volunteers kept by the Clearwater Police Force.

On careful consideration of all the above evidence, the administrative law judge has concluded that the most important factors regarding claimant's wor-

king relationship as an off duty policeman performing security and traffic work, namely those of control, skill, and the existence of a continuing relationship weigh heavily against claimant being found an employee in these situations. The administrative law judge believes that the claimant in fact was not controlled, nor subject to control regarding the details of his work. He was controlled only as to the hours that he would work and generally as to the place where he would work. He was told generally the result that was to be accomplished but was not controlled specifically regarding the means and methods for accomplishing the result. Control was exerted by the people who hired the claimaint only with respect to the time of work activity and the right to discharge him for any reason.

Other factors relating to control, as described above, including at most minimal integration of claimant's services in the business operation of those hiring him, also show that the claimant in fact was an independent contractor. The administrative law judge has concluded that monies received from Estate Jewlers, Frank's of Clearwater Mall, Golden Triangle Asphalt Company, Countryside Mall, Clearwater Yacht Club, Kash and Karry Supermarkets, U.S. Home Corportion, Royal Loan Office, and Philadelphia Phillies Baseball Club represent self-employment income of the claimaint.

With respect to the claimant's work activity for his neighbor, Norman Hauser, as a lawn maintenance man, the facts show that claimant was paid $6.00 every time that he cut the lawn and that he

probably was under instructions to cut the lawn whenever needed. The person who hired the claimant stated that claimant was to perform the services personally, that the claimant did not hold himself out to the public as available to do such work and that claimant was not required to follow any schedule nor was he given any instructions about how the work was to be done. This individual further stated that he could not change the methods used by the claimant in doing the work or otherwise direct him in doing the work, but that he could fire him at any time and claimant could stop working at any time. Mr. Hauser apparently supplied the lawn mower and gasoline. The claimant stated that he was not instructed regarding methods, but rather was simply told to cut the grass. He stated that he

'supposed" that Mr. Hauser could direct him as to how to do the work. In regard to scheduling, the claimant has stated that he was told to come at certain times so that Mrs. Hauser could close her windows.

Considering the factors relating to claimaint's work relationship to Mr. Hauser, the adminstrative law judge again notes there ws no opportunity for profit or loss, nor any investment in facilities. There was an on-going relationship and no particular skills were required. It does not appear that



there was specific control relating to the method of work, nor did Mr. Hauser believe that he had the right to control claimant's method of work. No training was provided and there were no set hours of work. While claimaint did perform

the work on Mr. Hauser's premises, the work could only be performed there. There does not appear to have been any order or sequence indicative of control of the patterns of claimant's work activity, and the claimant was paid by the job rather than by the hour, week, or month. Tools and materials were furnished by Mr. Hauser.

While admittedly there are factors tending to show both an employment and self-employment sitution, the administrative law judge is of the opinion that the preponderance of evidence reveals that the claimant was self-employed with respect to the lawn maintenance that he provided. Again, the administrative law judge finds the factor of control to be of primary importance, and it does not appear that claimant was subject to the control of his neighbor

with respect to when and how the maintenance was to be performed. Further, the claimant was paid by the job with no guaranteed minimum salary. The administrative law judge does not find that factors such as right to fire or right to quit and the providing of tools and materials necessary for the job overcome the lack of control. Therefore, the administrative law judge has concluded that the $240.00 received in 1980, and the $150.00 received in 1981, from Norman Hauser represent self-employment income of the claimant.

Finally, with respect to claimant's work in December, 1978, aiding a friend in installing an air-conditioner, the claimant clearly was an employee in this situation since he was subject to complete control by the person who hired him, was required to work at a

specific place for a specific amount of time in accordance with instructions by the person who hired him, and could be fired or could quit at any time. Similarly, there is significant integration of the services of the claimant and the business operations of the person who hired him. The administrative law judge, therefore, has concluded that claimant received $54.00 in wages during the last quarter of 1978 from such employment.

With respect to the crediting of amounts of earnings to claimant's earnings record and crediting of quarters of coverage to the claimant's earnings record, the administrative law judge specifically finds that notwithstanding claimant's receipt of $100.00 in self-employment income during the last quarter of 1974, $52.00 in self-employment income during

the first quarter of 1975, $36.00 in self-employment income during the fourth quarter of 1976, and $53.00 in self-employment income during the last quarter of 1977, the claimant cannot be credited with such amounts nor can he be credited with any additional quarter of coverage based thereon. Section 205(c) of the Act simply provides that after the expiration of the time limitation of three years, three months, and fifteen days, following any year, absence of an entry in the Secretary's records as to self-employment income shall be conclusive unless it is shown that the individual filed a tax return of his self-employment income for such year before the expiration of time limitation following such years. Claimant admittedly has not filed a tax return of such self-employment income for three years and

in fact, the evidence of record documents same. Further, in accordance with Section 211(b) of the Act, these



amounts are less than $400.00 and thus, the claimant is not entitled to any quarters of coverage. The claimant would not be entitled to any quarters of coverage regardless of whether or not his earnings record could be corrected to show such self-employment income. For the year 1978, the claimant received $54.00 in wages and $128.00 in self-employment income. The claimant is not entitled to any quarters of coverage for 1978, since, in accordance with Section 211(b) of the Act and 213(a) of the act, an amount of $250.00 s required to establish a quarter of self-employment income.

For the year 1979, the claimant received

$56.00 in self-employment income, but again he is not entitled to any quarters of coverage because he did not have at least $400.00 in self-employment income for such year.

The claimant already has been credited with four quarters of coverage for 1980, but he additionally is entitled to the crediting of $472.00 in self-employment income for such a year from work both as a lawn maintenance man and security guard/traffic controller.

Finally, for 1981, the claimant previously was credited with $44.25 in wages. Although he did have $334.00 in self-employment income from his work as an off duty police officer, he cannot be credited with any self-employment income because he again failed to have at least $400.00 in self-employment income. Therefore, he is not entitled to any

additional quarters of coverage for 1981.

The administrative law judge, in light of the above, has concluded that the claimant is not entitled to any further quarters of coverage, leaving him with only sixteen quarters of coverage in the twenty quarter period, ending with the quarter in which he alleges disability. The claimant, therefore, does not have disability insurance status as of his alleged disability onset date of June 27, 1981, and on that basis alone, is not entitled to a period of disability or to disability insurance benefits regardless of his residual functional capacity. The claimant in fact last met the special earnings requirements of the Act as of September 30, 1978.

FINDINGS

The administrative law judge makes the following specific findings in this case:

1. The claimant filed an application for a period of disability and disability insurance benefits on July 24, 1981, alleging disability commencing on June 27, 1981.

2. The administrative law judge has made no finding regarding the disability issue in this case, but rather has confined his inquiry to whether or not claimant has satisfied the earnings requirements of the Act as of his alleged disability onset date.



3. Despite the fact that claimant has alleged additional wages between 1974 and 1981, sufficient to entitle him to four or five additional quarters of coverage, the claimant has failed

to establish the presence of an employer-employee relationship except for work as a laborer for an air-conditioning company during the last quarter of 1978, for which he received $54.00 in wages.

4. The claimant's work as an off duty policeman doing security/traffic control and as a lawn maintenance man represent work on his part as an independent contractor rather than an employee.

5. Since income from claimant's endeavors as an independent contractor did no amount to $400.00 in any year between 1974 and 1981, the claimant is not entitled to have his earnings record altered to reflect additional self-employment income. This employment record may be altered, however, to reflect $54.00 in wages for 1978.

6. The claimant is not entitled to any additional quarters of coverage

based upon self-employment income or wages.

7. The claimant was last insured for purposes of entitlement to disability and disability insurance benefits with the close of September, 1978, and, therefore, did not satisfy the disability insurance status requirement as of his alleged disability onset date of June 27, 1981.

DECISION

It is the decision of the administrative law judge that, based upon application filed on July 24, 1981, the claimant is not entitled to a period of disability or disability insurance benefits under Sections 216(i) and 233 of the Social Security Act, as amended.

/s/_____
Marvin J. jSchmitt
Administrative Law Judge

Dec 5, 1983
(Date)